STATE OF MICHIGAN

COURT OF APPEALS

In the Matter of D. M. MITCHELL, Minor.

UNPUBLISHED
October 15, 2013

No. 314549
Wayne Circuit Court
Family Division
LC No. 08-478151-NA

Before: M. J. KELLY, P.J., and WILDER and FORT HOOD, JJ.

PER CURIAM.

Respondent appeals as right the order terminating her parental rights to the minor child under MCL 712A.19b(3)(a)(*ii*), (c)(*i*), (g), (k)(*i*), and (l). Because we conclude that there were no errors warranting relief, we affirm.

The court took jurisdiction over respondent's six older children in April 2008 because of neglect, domestic violence, and substance abuse. Respondent failed to comply with a court ordered treatment plan, and the court terminated her parental rights to five of the children in December 2009.

Respondent's oldest son was placed in a guardianship with his grandmother, but was subsequently placed back in respondent's care on the condition that she comply with various services. Shortly thereafter, the Department of Human Services removed the oldest son and the minor child involved in this appeal from respondent's care and filed a petition alleging that respondent failed to comply with the required services. The court assumed jurisdiction over the minor child and his older brother in October 2011 and ordered respondent to complete another treatment plan, but she failed to comply and the Department filed a petition to terminate her rights to the minor child. Respondent did not attend the termination hearing; the only witness was a case-worker who testified about respondent's lack of compliance. Following the hearing, the court entered its order terminating respondent's parental rights to the minor child.

This appeal followed.

Respondent first argues that the court erred in terminating her parental rights to the minor child because she was not properly served with process. Respondent did not raise this issue before the trial court. In civil cases Michigan courts follow the "raise or waive" rule of appellate review. *Walters v Nadell*, 481 Mich 377, 387; 751 NW2d 431 (2008). Although Michigan courts have the discretion to review unpreserved errors, this Court will exercise that authority "quite sparingly" and only to avoid a miscarriage of justice. *Napier v Jacobs*, 429 Mich 222,

233; 414 NW2d 862 (1987). Michigan courts will, however, review unpreserved errors in criminal trials to protect a defendant's right to a fair trial. See *Napier*, 429 Mich at 233; see also *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). Because a parent's right to the custody of his or her child is an important liberty interest protected by the constitution, this Court will similarly review unpreserved errors in termination proceedings for plain error. See *In re Rose*, 174 Mich App 85, 88; 435 NW2d 461 (1989), rev'd on other grounds 432 Mich 934; *In re Utrera*, 281 Mich App 1, 8; 761 NW2d 253 (2008). Therefore, we shall review this claim for plain error affecting respondent's substantial rights.

Respondent was entitled to personal service of a summons and notice of proceedings involving the minor child. *In re SZ*, 262 Mich App 560, 564; 686 NW2d 520 (2004). "However, in cases in which personal service is impracticable, substituted service is permissible" and "is sufficient to confer jurisdiction on the court." *Id.* at 565. Respondent argues that service by publication was inappropriate because the court failed to take testimony before ordering service by publication. Although the applicable court rule, MCR 3.920(B)(4)(b), contains a requirement that the court's finding of impracticability be based on "testimony or a motion and affidavit," the controlling statute regarding substituted service, MCL 712A.13, has no such requirement. "Because the issue of service is a jurisdictional one, the statutory provision governs." *In re SZ*, 262 Mich App at 568.

MCL 712A.13 gives the judge discretion to find that personal service is "impracticable" and to "order service by registered mail addressed to their last known addresses, or by publication thereof, or both, as he may direct." The statute "contains no specific requirements concerning what types of evidence a court must consider in determining whether substituted service is indicated, or the form in which the evidence must be received." *In re SZ*, 262 Mich App at 568. However, if the court failed to follow the statutory notice requirements, this would constitute a jurisdictional defect that rendered all further proceedings regarding respondent void, including the termination order. *In re AMB*, 248 Mich App 144, 173; 640 NW2d 262 (2001).

In this case, we conclude that the court followed the statutory notice requirements. Before relying on publication and proceeding with the hearing, the court noted that there were three unsuccessful attempts at personal service at respondent's last known address and that two notices about the proceedings sent by certified mail were returned as unclaimed. The court was also informed that recent attempts to contact respondent were unsuccessful. The fact that the court permitted the publication process to begin before the attempts to personally serve respondent does not render the family court's subsequent findings invalid. See *In re SZ*, 262 Mich App at 569 n 4. Moreover, we conclude that respondent abandoned her arguments regarding the sufficiency of the publication and attempted personal service by failing to properly support those arguments on appeal. *Ypsilanti Charter Twp v Kircher*, 281 Mich App 251, 287; 761 NW2d 761 (2008).

We also reject respondent's claim that she was denied the effective assistance of counsel. The principles of effective assistance of counsel developed in the context of criminal law apply to the right to counsel guaranteed in child protective proceedings. *In re CR*, 250 Mich App 185, 197-198; 646 NW2d 506 (2001). Where, as here, the lower court did not conduct a hearing on the claim that counsel was ineffective, our review is limited to mistakes that are apparent on the

record. *People v Gioglio (On Remand)*, 296 Mich App 12, 22; 815 NW2d 589 (2012), lv denied in relevant part, 493 Mich 864.

In order to establish that her trial counsel was ineffective, respondent must show that her counsel's acts or omissions fell below an objective standard of reasonableness under prevailing professional norms and that there is a reasonable probability that, but for the errors, the result of the proceedings would have been different. *Id.*

Respondent claims that her trial counsel's remarks during summation prejudiced her hearing. Specifically, she complains that her trial counsel should not have asked to withdraw from representing respondent and should not have stated that she had not been paid for her work. However, there is no record evidence that the remarks or comments in any way influenced the court's decision. Thus, even if the request and comments were inappropriate, respondent has not demonstrated that there is a reasonable probability that the request or remarks affected the outcome of the proceedings. *Id.*

Respondent also argues that her trial counsel was ineffective because she could have called respondent to testify, could have called other witnesses, and could have elicited testimony from the Department's witness that would have justified respondent's "missed screens." However, respondent failed to present any evidence that her proposed witnesses were ready, willing, and able to testify on her behalf and failed to present any evidence concerning the testimony that they would have offered—let alone evidence that it would have been favorable. She similarly failed to present any evidence that the Department's witness would have testified that respondent had an excuse for her missed screens. Respondent had the burden to establish the factual predicate for her claims of ineffective assistance, which burden she did not meet. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999). Therefore, she has not established her right to relief.

Finally, we conclude that it was not plain error for the family court to take judicial notice of the file while indicating that part of it was missing. *Utrera*, 281 Mich App at 8. The record shows that the court had the relevant documents in its possession when it rendered its decision, and that its decision was fully supported by all the evidence.

There were no errors warranting relief.

Affirmed.

/s/ Michael J. Kelly
/s/ Kurtis T. Wilder
/s/ Karen M. Fort Hood